

# NAVAL POSTGRADUATE SCHOOL

## Monterey, California



## THESIS

**BINDING ARBITRATION AND THE SUMMARY TRIAL  
WITH BINDING DECISION: A COMPARISON OF THE  
TWO METHODS IN RESOLVING DISPUTES**

by

John D. Van Gorp

June 2002

Principal Advisor:  
Associate Advisor:

Ron B. Tudor  
James M. Barnard

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**BINDING ARBITRATION AND THE SUMMARY TRIAL WITH BINDING  
DECISION: A COMPARISON OF THE TWO METHODS IN RESOLVING  
DISPUTES**

John D. Van Gorp  
Lieutenant Commander, United States Navy  
B.S., Jacksonville University, 1992

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**NAVAL POSTGRADUATE SCHOOL  
June 2002**

Author:

John D. Van Gorp

Approved by:

Ron B. Tudor  
Principal Advisor

James M. Barnard  
Associate Advisor

Douglas A. Brook  
Dean, Graduate School of Business & Public Policy

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## **ABSTRACT**

Alternative Dispute Resolution (ADR) encompasses a broad range of binding and non-binding techniques to resolve controversies without litigation. Congressional Legislation and Executive orders since 1990 have emphasized the need to use ADR. The intent was to stop the rapid growth of claims against the Government and to authorize and encourage agencies to seek methods other than litigation in order to promote prompt settlement of claims. Using ADR can potentially save a great deal of time and money by providing more options to resolve disputes. It allows us to become more similar to the civilian community, enhances our relationship with business and promotes competition. The objective of this research is to determine if binding arbitration should be a viable means of resolving conflict within the Department of Defense (DoD). The thesis provides a legislative background of ADR, and briefly discusses various techniques of the ADR process. Binding arbitration is compared to the Summary Trial With Binding Decision, a form of ADR available at the Armed Services Board of Contract Appeals (ASBCA). The advantages, disadvantages and differences are then analyzed. This study concludes that DoD should take advantage of the benefits that binding arbitration offers.

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## **I. INTRODUCTION**

### **A. BACKGROUND**

Alternative Dispute Resolution (ADR) is a term used to describe any voluntary means of resolving a dispute between two parties that does not involve going to trial. Methods of ADR range from Mediation, an informal technique, to Arbitration, the most formal technique. The commonality for all types of ADR is that it is voluntary for both sides and there is at least one, trained, neutral, third party to facilitate resolution of the dispute.

Although ADR has been around for a long time, the Department of Defense (DoD) did not begin to use it heavily until the last decade. Previously, the only options available to the DoD contracting officer and DoD contractor fell between one of two extremes - negotiation or litigation. Now that ADR is available, contracting officers and contractors have choices that range from simple negotiation to assisted negotiation, to simplified arbitration and to full arbitration as an alternative to or prior to engaging in litigation.

Legislation and Executive orders since 1990 have emphasized the need to use ADR. The intent was to stop the rapid growth of claims against the Government, and to authorize and encourage agencies to seek methods other than litigation in order to promote prompt settlement of claims. By promoting ADR, the Government has the potential to save a great deal of time and money, increase its options to resolve disputes, adopt commercial practices, enhance business relationships and promote competition.

Beginning with the passage of the ADR Act of 1990, agencies began developing policies and procedures that promoted and encouraged ADR. The ADR Act required the DoD and all other Federal agencies to assign a senior official as the dispute resolution specialist. The ADR Act also required the DoD to train personnel involved on the “the theory and practice of negotiation, mediation, arbitration, or related techniques.” [Ref. 33]

A 1998 survey showed that 78% of corporations used arbitration during the prior three years. [Ref. 38] This shows that arbitration is a tool that the DoD needs to consider when faced with litigation. Although binding arbitration is not currently allowed within

the DoD, the Summary Trial With Binding Decision is a viable option. This thesis discusses arbitration as it is used in the commercial sector and the Summary Trial With Binding Decision, a form of ADR used at the Armed Services Board of Contract Appeals.

## **B. OBJECTIVES**

The primary objectives of this thesis are:

1. To provide information on arbitration, describing its advantages, disadvantages, and limitations, and the key characteristics of a dispute that make arbitration appropriate.
2. To provide a historical background and explore the impact of legislative and Executive action authorizing and promoting arbitration and alternative dispute resolution.
3. To review and assess the latest publications, reports and articles on the effectiveness of arbitration and its future as a means of resolving conflict.
4. To identify what barriers exist within the DoD and the civilian community that prevent personnel from utilizing arbitration or the Summary Trial With Binding Decision.

## **C. RESEARCH QUESTIONS**

To achieve the objectives of this thesis, the following questions are posed:

### **1. Primary Research Question:**

What are binding arbitration and the Summary Trial With Binding Decision, their advantages and disadvantages and how are these forms of Alternative Dispute Resolution beneficial to the DoD?

### **2. Secondary Research Questions:**

- a. What is the history and background of ADR?
- b. How do commercial organizations use binding arbitration to resolve contract disputes?



c. What are the principal similarities between how commercial organizations and the DoD use binding arbitration?

d. How might the DoD improve or enhance its use of the commercial application of binding arbitration?

## **D. SCOPE**

The scope of this thesis includes an objective assessment of arbitration so members of the DoD can determine if arbitration or Summary Trial With Binding Decision are types of ADR that would be helpful in resolving conflict. The extent of the study will include:

(1) A review of the history and regulations regarding the evolution of the ADR process;

(2) An examination of the different types of ADR;

(3) Presentation of issues and concerns associated with arbitration; and

(4) An analysis of the strengths and weaknesses of arbitration

The scope of this thesis will not include an in-depth assessment of other forms of ADR such as mediation or the mini-trial. The researcher does not suggest that alternative dispute resolution is an attractive option for every dispute. Members of the DoD faced with a conflict or litigation must seek appropriate counsel and use sound business judgment when deciding how to resolve the matter.

The researcher will not attempt to develop unique empirical data. Only existing data and information is used within the scope of this thesis. The thesis will conclude with relevant suggestions and recommendations to improve utilization of arbitration within the DoD.

## **E. LIMITATIONS**

This study is limited somewhat by the fact that the proceedings and records of all forms of ADR, including arbitration and the Summary Trial With Binding Decision are kept confidential. Because of this, the researcher found it difficult to find data on actual disputes and to interview DoD personnel or private company personnel about disputes

that were handled by arbitration. It was also difficult to find empirical data on the actual time savings and cost savings associated with ADR. Because of this, the opinions and conclusions that this researcher has drawn are therefore based on the literature available and on the experiences and opinions of those questioned.

## **F. ASSUMPTIONS**

This thesis was written with the following assumptions:

1. The reader has a need for information on arbitration and how it is used to resolve disputes, its advantages and disadvantages and the key characteristics of a dispute that make arbitration appropriate.
2. The reader has some background knowledge on ADR.
3. The reader has knowledge of how contract disputes are handled according to Federal regulations.
4. The reader has legal assistance available to help with the dispute resolution process and to clarify information provided in this study.

## **G. METHODOLOGY**

A literature review was conducted from sources in both the public and private sectors that specialize in alternative dispute resolution. The types of literature reviewed included:

1. Books on resolving business disputes, types of ADR, arbitration, and legal concerns.
2. Magazine articles reviewing the latest developments of ADR and arbitration.
3. Policy papers prepared by the President, Secretary of Defense and Under-Secretaries of Defense.
4. Congressional legislation and other acts pertaining to ADR and arbitration.
5. Transcripts of interviews of personnel discussing ADR.
6. Web-based sites providing an array of information on ADR and arbitration.

The literature review was conducted to provide the researcher ample information on the history, background and legislation regarding ADR. By doing so, the researcher was able to provide a comprehensive review of arbitration and its position within the DoD.

## **H. ORGANIZATION OF THESIS**

This thesis is organized into five chapters. Chapter I provides a brief background and outlines the objectives, research questions and scope of this thesis. The chapter establishes limitations and assumptions and describes the methodology used to conduct the research.

Chapter II provides a historical background of alternative dispute resolution. The chapter discusses the legislation and regulations behind it. The chapter describes the different types of ADR including arbitration and the Summary Trial With Binding Decision.

Chapter III provides a comparison and lists the advantages and disadvantages of arbitration and Summary Trial With Binding Decision.

Chapter IV provides an analysis and assessment on the use of arbitration and the Summary Trial With Binding Decision. In the analysis, the significant differences and similarities between the two are identified and discussed. The chapter evaluates the barriers to the DoD's use of binding arbitration.

Chapter V is a summary of the thesis and answers the primary and secondary research questions that were asked in Chapter I. The researcher offers specific conclusions and recommendations for improvements to the DoD's use of binding arbitration and Summary Trial With Binding Decision. Areas for further research are then identified and discussed.

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## **II. HISTORY AND BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION**

### **A. INTRODUCTION**

There have been alternative forms of dispute resolution for thousands of years. The earliest known use is where the Greeks and the Phoenicians had agreements to use roaming arbitrators to settle civil disputes in the Sixth Century B.C. [Ref. 1] The term “Alternative Dispute Resolution” (ADR) became common in the private sector in the 1960’s [Ref. 8] and was first used in the DoD soon after that in 1978. [Ref. 30]

### **B. LEGAL BACKGROUND**

The Federal Government began using alternatives to litigation with the Pennsylvania Arbitration Statute of 1705. For the DoD, alternatives to litigation began with the creation of the Armed Services Board of Contract Appeals (ASBCA) in the 1950’s. At the time, the defense industry was growing and disputes were becoming more and more complex. The ASBCA began by providing a means of resolving disputes without using the Federal Court System. As time went by the ASBCA took on a more judicial role. Now, the ASBCA is a fully regulated, precedent setting, legal path that the DoD and Industry use to resolve legal disputes.

#### **1. Contract Disputes Act of 1978**

The true birth of “Alternative Dispute Resolution” in the DoD began with the Contract Disputes Act (CDA) of 1978. The CDA’s two dominant reasons for passage were “ . . .eliminating both unnecessary delay by government contracting officers in rendering decisions on claims, and over inflation of claims by contractors.” The CDA did not require ADR but it did allow Contracting Officers and Contractors to request ADR. The following language was included in the CDA to promote ADR:

In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5, United States Code, or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a

contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request. [Ref. 30]

For the DoD contracting officer, the CDA provided an extensive legal framework on claims including:

- 1) The definition of a claim
- 2) How to initiate claims
- 3) Certification requirements when the claim exceeds \$100,000
- 4) How to handle suspected fraudulent claims
- 5) Requirements for responding to a claim including statutory time-limits
- 6) Rules regarding interest on claims
- 7) Procedures for issuing decisions against claims
- 8) Rules for continued contractor performance after a claim has been submitted

## **2. Administrative Dispute Resolution Act (ADR Act) of 1990**

Although alternative forms of dispute resolution for the DoD were available beforehand, ADR would not be used as extensively as it is today without the Administrative Dispute Resolution Act (ADR Act) of 1990. This was the first real legislative “push” to promote ADR. The goal of the ADR Act was to send a clear message that ADR “is an accepted practice and to provide support” for agencies to use and to develop programs that promote ADR. [Ref. 31] The ADR Act:

- 1) Required agencies to establish ADR policies
- 2) Required agencies to appoint a dispute resolution specialist to implement ADR policies
- 3) Established an interagency ADR working group to promote development of ADR programs
- 4) Required agencies to develop ADR training programs
- 5) Required agencies to review all administrative procedures, grants, contracts and contract clauses for ADR possibilities
- 6) Amended the Federal Acquisition Regulations to encourage agencies to use ADR procedures to the maximum extent practicable

- 7) Required a written explanation citing specific statutory reasons whenever a contractor or contracting officer declines a request for ADR
- 8) Encouraged agencies and their contractors to adopt an ADR pledge committing them to resolve disputes by ADR whenever possible
- 9) Created binding and non-binding arbitration procedures
- 10) Created a framework for confidentiality of ADR proceedings

The ADR Act included a sunset provision that terminated the authority of agencies to use this act on October 1, 1995. The ADR Act was extended by the Federal Acquisition Streamlining Act (FASA) of 1994 and became permanent with the passage of the ADR Act of 1996.

### **3. Federal Acquisition Streamlining Act of 1994**

FASA was passed to improve efficiency in Government contracting and stressed the importance of using ADR to resolve contract disputes. Regarding ADR, the key provisions are:

- 1) Allowed agencies to purchase the services of a third party neutral without using competition in order to speed up the ADR process
- 2) Permitted parties to select from a pool of Federal mediators
- 3) Required parties to explain in writing any decision to reject another party's request for ADR

### **4. Administrative Dispute Resolution Act of 1996**

The Administrative Dispute Resolution Act of 1996 (ADR Act of 1996) permanently authorized the ADR Act. The ADR Act of 1996 made only minor changes to the ADR Act. The changes are:

- 1) Eliminated the need to certify claims below \$100,000
- 2) Strengthened confidentiality measures
- 3) Provided additional guidance on the use of binding arbitration.

The guidance on arbitration allowed parties to agree to arbitration before or after a dispute occurs. Agreeing to arbitration cannot be a requirement to signing the contract. The parties may make agreements about specific issues in controversy and they may select a range of the award amount. However, there must be a limit on the amount.

The ADR Act of 1996 included guidance on who has the authority to agree to arbitration. It stated that agencies must issue guidance on the appropriate use of arbitration and when personnel have “ . . . authority to settle an issue in controversy through binding arbitration. [Ref. 33]

### C. TYPES OF ALTERNATIVE DISPUTE RESOLUTION

The two most popular and most common types of alternative dispute resolution are mediation and arbitration. [Ref. 21] All other forms of ADR are a hybrid or other combination of mediation and arbitration. The ADR continuum in Figure 1 was adapted from the Defense Logistics Agency’s ADR Training Manual. [Ref. 1]

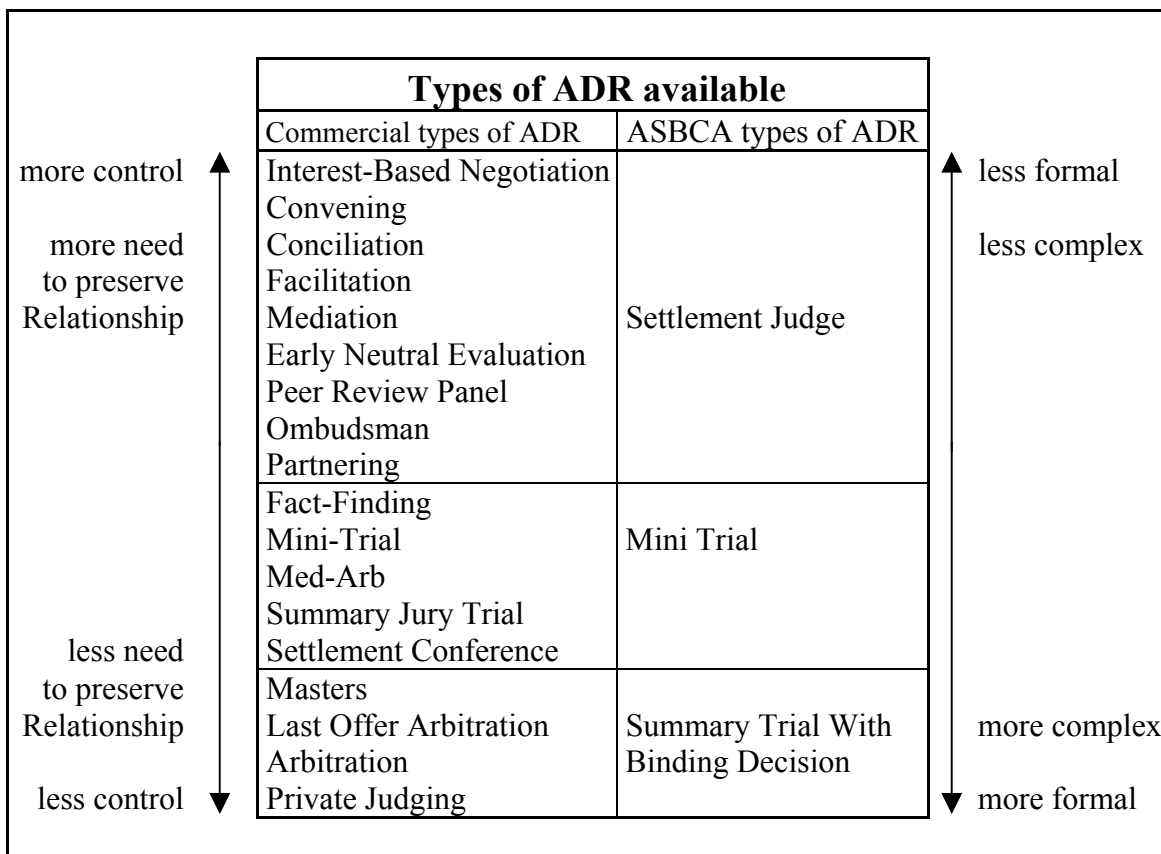


Figure 1. The ADR Continuum

The below list of ADR types is listed in the same order as the continuum in order to illustrate how the measure of control decreases while the complexity of the dispute and formality of the ADR proceedings increases.



## **1. Interest-Based Negotiations**

Interest Based Negotiations, Interest Based Bargaining and Interest Based Problem Solving techniques may or may not require the use of neutrals. Interest based negotiations are also referred to as “principled” or “win-win” negotiations. [Ref. 1] The primary goal is to resolve the dispute and improve the relationship between the two parties. It begins with a meeting to identify and discuss the issue in dispute. Brainstorming techniques are often used to come up with potential solutions. Trust is critical for interest-based negotiations. The goal is to reduce the importance of how the dispute occurred. Both parties need to make a positive effort to work together to resolve their common dispute.

## **2. Convening**

Convening identifies the issues in dispute and selects the personnel responsible for resolving the matter. The neutral, called a convenor, helps to bring the parties together in order to begin negotiating a solution. Once the parties have convened, they may use other ADR techniques to resolve the issues in dispute. [Ref. 1]

## **3. Conciliation**

Conciliation involves a third party (conciliator) that may or may not be neutral to the dispute. Conciliation is used when parties are unwilling, unable, or unprepared to come to the bargaining table. The conciliator may begin by carrying initial messages between the two parties and providing a neutral meeting place in an effort to help establish communications. He or she attempts to promote openness, build or re-build the relationship and clarify misperceptions between the two parties. A conciliator must be able to deal with strong emotions and build trust for cooperative problem solving. The conciliator helps the parties repair the relationship. After conciliation, the parties may use other ADR techniques to resolve the issues in dispute.

## **4. Facilitation**

Facilitation uses a third party or facilitator to improve the flow of information between two parties or within a group. The facilitator may or may not be neutral to the dispute. The facilitator’s emphasis is on providing an efficient procedure to continue

dialog and move towards an agreement. His or her role is not to interpret factual issues or make recommendations like a mediator. Therefore, a facilitator's role is more limited than a mediator's.

## **5. Mediation**

Mediation is the most common and most popular form of ADR. Mediation requires a third party neutral or mediator who assists the parties in reaching an agreement. Mediators need not be subject matter experts. The mediator will meet with each side individually or with both sides together as needed.

Mediators do not have any decision-making authority and cannot impose a solution on the parties; the parties make the decision themselves. However, the mediator, like a facilitator, serves as the supporter of the process to keep discussions going so that the parties can resolve their dispute. [Ref. 1]

## **6. Settlement Judge**

Settlement Judge is a form of ADR available with the Armed Services Board of Contract Appeals. If parties elect to use a settlement judge they first draft an agreement on the procedures that will be used to carry out the proceedings. The agreement is drafted according to the circumstances of the case. Settlement judges primarily act as mediators and use a variety of techniques to resolve the dispute. The judge acts as a third party neutral to facilitate settlement negotiations. He or she will meet privately with both sides, as in Early Neutral Evaluation, and advise them on the merits of the case. Cases that are factually and legally complicated are well suited for the settlement judge procedure. [Ref. 7]

## **7. Early Neutral Evaluation**

Early Neutral Evaluation uses a third party neutral to provide an evaluation to both sides of a dispute. The neutral is usually an expert on the issue being disputed. Both sides informally present their case to the neutral who then advises each side individually on the strengths and weaknesses of their cases. The evaluation may be binding or non-binding.

Early neutral evaluation is an excellent alternative when there are many technical issues that need to be interpreted. It is also useful when decision makers or supervisors of one or both parties need clarification on the value of their cases.

Early neutral evaluation is used in a number of courts across the country including U.S. District Courts. [Ref. 16] Both disputants and courts may request early neutral evaluation to speed up the discovery process, particularly when the dispute involves technical or factual issues that lend themselves to expert evaluation.

## **8. Peer Review Panel**

Peer Review Panels, Dispute Panels and Dispute Resolution Panels use a single third party neutral, or a panel to help resolve disputes as soon as they are discovered in order to avoid traditional litigation. For workplace disputes, the panel will be composed of fellow employees and supervisors. The panel will review the conflicting data, fill in missing information, assess the issues, and clarify the facts to both sides. The panel helps to resolve conflicts by assessing the issues and making procedural or factual recommendations.

For contracting disputes, the panel will be composed of subject matter experts that are selected by the disputing parties. The decision of the panel may or may not be binding, depending on the agreement made by the two parties before hand. [Ref.1]

## **9. Ombudsman**

Ombudsman, Ombudsperson or Ombuds are advocates designated by the company to confidentially investigate and resolve sensitive complaints. The ombudsman does not normally have the authority to enforce a solution. Ombudsmen often work as advisors to management and a focal point for employees to help identify problems and recommend solutions.

## **10. Partnering**

Partnering seeks to prevent disputes before they occur. The Federal Government uses partnering in contracts to share risk. By building a partnering team both sides can define a common goal and work together as a team throughout the contracting process to achieve the goal. The key is to build strong relationships from the beginning.

Partnering is a relatively new hybrid form of dispute resolution. Since the mid-1990's, the Defense Contract Management Agency (DCMA) has adopted a form of risk management known as "Process Oriented Contract Administrative Services" (PROCAS). These are partnering agreements with contractors in many diverse projects to lower overall costs of Government contracting by avoiding formal disputes. However, DCMA's PROCAS agreements usually are not "partnering agreements" in the ADR sense because they lack contractual power. True partnering agreements typically require a pre-defined dispute resolution processes such as mediation prior to more formal proceedings. [Ref. 1]

### **11. Fact-Finding**

Fact-Finding and Neutral Fact-Finding involve the investigation of facts by an impartial expert or group. The fact-finder investigates, evaluates and reports the facts to both sides of the case. He or she is not permitted to resolve or decide any issues of law but his or her expertise is expected to carry significant weight with both sides. Fact-finding is successful if both parties resolve the dispute but it is also useful if negotiations fail. The information can still be used in traditional litigation.

### **12. Mini-Trial**

Mini-Trial is not a "small trial." It's not a trial at all. It is a process where both sides of a dispute make brief presentations of their arguments to senior executives in their organizations. The most important requirement is that the senior executives have the authority to settle the dispute. After hearing the evidence, the senior executives will privately discuss the case. A third party neutral usually facilitates the process by helping with the presentation of evidence and acting as a mediator in order to reach a settlement. This technique is available in the private sector and at the ASBCA.

### **13. Mediated Arbitration**

Mediated Arbitration (Med-Arb) is a combination of mediation and arbitration. Med-Arb uses a neutral mediator to resolve as many of the issues as possible. After reaching an impasse, the mediator or a new neutral then arbitrates the remaining issues in dispute. His or her decision can be binding or non-binding. Med-Arb allows both sides

to quickly resolve simple issues so that efforts can now be placed on the more difficult issues.

#### **14. Summary Jury Trial**

The Summary Jury Trial is a formal but abbreviated trial involving a presentation by the disputing parties to a panel of jurors. This process “reality tests” the case with a non-binding verdict to encourage the parties to negotiate for a settlement based upon their new assessment of litigation risk. The summary jury trial should not be confused with a mini-trial, an entirely different process. [Ref. 1]

#### **15. Settlement Conference**

The Settlement Conference is an ADR technique either permitted or required by statute in many jurisdictions as a procedural step before trial. An assigned or jointly selected settlement judge typically applies mediation techniques to strongly suggest a specific settlement range based on his or her assessment of the case. However, these judges play a much stronger authoritative role than mediators since they also provide the parties with specific substantive and legal information. [Ref. 1]

#### **16. Masters**

Masters or Special Masters are neutrals appointed by a court in accordance with judicial rules. The master assists the parties to manage discovery, narrow issues, agree to stipulations, find facts, and occasionally, reach settlement. In non-jury actions, the court may accept the Master’s findings of fact. [Ref. 1]

#### **17. Last Offer Arbitration**

Last Offer Arbitration is often used in the resolution of money claims or in the resolution of salary disputes. During arbitration, the parties each submit their last offer of settlement to the arbitrator. The arbitrator must then choose one offer or the other, and the parties agree to be bound by that decision. Thus, the parties set the limits of the arbitrator’s award. Last offer arbitration may be less likely to freeze negotiations between the parties before they reach the arbitration phase, since mutuality is aided by the fact that the neutral will decide between one party’s offer or the other. Therefore, it is

in the parties' best interest to be as realistic as possible in submitting their offers. [Ref. 19]

### **18. Summary Trial With Binding Decision**

Summary Trial With Binding Decision is available at the ASBCA. This procedure utilizes a board judge. The judge will informally hear both sides and render a binding decision. The decision is not subject to appeal. Both sides must draft an agreement before the proceedings begin describing the limits on the number of witnesses, the amount of evidence and the amount of time for presentations. After hearing both sides, the judge renders a decision that is binding and does not set a precedent.

### **19. Arbitration**

Arbitration is the second most popular type of ADR. [Ref. 21] It has been used extensively in recent years to resolve labor/management and commercial disputes. In arbitration, both parties present their issues to a third party neutral or panel. Generally, both sides have a role in selecting the arbitrator. The arbitrator is usually a subject matter expert. The rules of evidence are relaxed. Both sides can agree before hand on the amount of evidence allowed and the time limits. The arbitrator makes a decision that has the full force and effect of law and is not open for appeal. The decision is usually binding but is kept private and does not set a precedent.

Under the ADR Act, non-binding arbitration became available for use in Government contract issues. Current DoD regulations do not allow binding arbitration.

### **20. Private Judging**

Private Judging is a technique that falls between arbitration and litigation in terms of formality and control of the parties. The parties present their case to a judge in a private courtroom. Private judges are usually retired judges who are experts in the matter under review.

## **D. ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION**

The biggest advantage of ADR over litigation is it can provide the best solution with the least amount of resources. ADR techniques are extremely flexible. They allow

parties to choose the amount of control they maintain and the amount of authority given to the third party neutral. Additionally, ADR is a non-adversarial process that helps to preserve the relationship between the two parties by making the communication cooperative vice combative. This cooperative atmosphere is attainable due to the confidential nature of the proceedings. Parties are more open to discussion if their statements are not available for public scrutiny.

An August 2001 *Defense Daily* article claimed that for cases that exceed \$1 million, traditional litigation took an average of five and a half years to resolve. In cases where ADR was used, the disputes were resolved in an average of 120 days. [Ref. 37]

#### **E. WHEN TO USE ALTERNATIVE DISPUTE RESOLUTION**

Alternative dispute resolution is an excellent option when both sides agree that a quick resolution could be obtained by streamlining the dispute process. It is also appropriate when one or both parties are “locked” into their positions and a third party is capable of bringing the two sides back to the bargaining table. The neutral can interpret the facts and merits of each side and help resolve the matter. If both sides can agree that the other side has a legitimate concern, then the real problem is reaching an agreement on a proper settlement. If only one side of the dispute holds an unrealistic view of the case a third party can realistically appraise the situation. The last factor that favors ADR is when there is a bad law or one or both sides wish to avoid an adverse precedent. An example of this is a desire by the Government to pay a portion or all of a claim without opening themselves up to numerous claims on matters that could be considered bogus.

#### **F. DISADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION**

When agreeing to ADR, there is always an inherent lack of finality. Another inherent weakness is the lack of enforcement authority given to the neutral. The biggest disadvantage to ADR is that there is no guarantee that the dispute will be resolved. Because of these doubts, parties may feel that ADR is a waste of time and that ADR will only increase litigation costs by providing the other side with information that makes

them vulnerable. To some parties, agreeing to ADR may be viewed as a weakness by the other side.

Using ADR depends on the willingness and the “good-faith” of the other party. If one party acts in “bad-faith” they could merely be delaying action, which will cause further damage to the relationship.

There is often a lack of information or lack of training on ADR on one or both sides. The lack of rules may lead lawyers to recommend against using ADR. [Ref.11] Lastly, ADR lacks due process, procedural safeguards and does not set a precedent.

## **G. WHEN NOT TO USE ALTERNATIVE DISPUTE RESOLUTION**

The ADR Act listed several circumstances where ADR would not be appropriate: [Ref. 33]

- 1) When there is an allegation of fraud or other crime
- 2) When a definitive and authoritative decision is needed as a precedent
- 3) When the matter involves significant issues of Government policy and ADR will not assist policy development
- 4) When maintaining established policy and avoiding variations in implementation is of special importance
- 5) When the matter significantly affects non-parties
- 6) When a full public record of the proceeding or resolution is important
- 7) When the agency must maintain continuing jurisdiction over the matter with the right to alter the resolution as circumstance demands

## **H. SUMMARY OF CHAPTER**

This chapter began with a brief legislative history of ADR in order to give the reader a concise background on the development of ADR. It then illustrated the ADR continuum to show the options available and to indicate how the different techniques become more complex and more formal while the user gives up more and more control.



The different forms of ADR are then listed with descriptions of how they are utilized. This list is not meant to be all-inclusive but it is designed to give the reader a sense of the options available. This chapter then summarized when to use and when not to use ADR and concludes with the advantages and disadvantages of ADR.

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### **III. COMMERCIAL ARBITRATION AND SUMMARY TRIAL WITH BINDING DECISION**

#### **A. INTRODUCTION**

The researcher has provided a legal background on alternative dispute resolution (ADR) legislation, defined the different types of ADR procedures available, listed advantages and disadvantages of using ADR and briefly described when to use and when not to use ADR. This chapter discusses commercial arbitration, as it is used in the private sector, and the Summary Trial With Binding Decision, as it is used at the Armed Services Board of Contract Appeals (ASBCA).

#### **B. ARBITRATION**

##### **1. Background**

The Federal Acquisition Regulation (FAR) 33.201 states ADR procedures “may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, mini-trial, arbitration, and use of ombudsmen.” However, FAR 33.214(g) states, “Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines.” Since the Department of Defense (DoD) has not issued any guidelines on the use of binding arbitration, it is not allowed.

Although non-binding arbitration is a technique that can be used, because of its non-binding nature, it is more related to mediation and other non-binding ADR techniques. Non-binding arbitration is only related to binding arbitration by name. Because non-binding arbitration as an ADR technique is so different from binding arbitration it is not discussed here. All future references to arbitration in this paper refer to binding arbitration.

Arbitration is the second most common form of ADR. [Ref. 21] A 1998 survey of 1000 of the largest U.S. corporations showed that 78% of them used arbitration in the last three years. [Ref. 38] The survey also showed that 71% of respondents expected to expand their use of arbitration. The primary reason cited for not using arbitration was that the opposing party was not willing to participate in the process. One example where

arbitration is widely used is in the construction industry where it is common to have an arbitration clause in the contract. The faster process of arbitration helps to avoid expensive delays in construction.

There are two basic paths that lead to arbitration. The most common path is where arbitration was agreed to in the original business agreement. [Ref. 29] The American Arbitration Association uses the following clause for such agreements:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. [Ref. 10]

The second path to arbitration is where two parties have an existing dispute and agree to resolve it through arbitration. This agreement may be worded as follows:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly). We further agree that the above controversy be submitted to (one to three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award. [Ref. 10]

## **2. Advantages**

Even though arbitration is the most formal type of ADR, it is still preferable to going to court. Arbitration is much quicker, has limited discovery and is cheaper. The evidence and award remain private. It helps to preserve the relationship. Users of arbitration find they are more satisfied with the process and the settlement. They are able to select their own decision maker. No legal precedence is set and the decision cannot be appealed. In summary, the control over the process (the ability to craft the process as required) is the single most important advantage of arbitration. [Ref. 29]

### ***a. Time***

In standard litigation, the amount of evidence either side can present is virtually unlimited. In arbitration, there is a shorter discovery process. A shorter discovery process means less time for each side to present their case. The biggest time

saver is the amount of time spent preparing for a case. The majority of a lawyer's time is spent gathering and presenting evidence as opposed to gathering and arguing the law. [Ref. 17] Limited discovery forces both sides to present only the most compelling evidence. Another time saver is in setting the court date. Normal litigation has been known to take years just to begin the process. In commercial arbitration, it is up to the parties to select a date. One study put the average time from submission of the dispute to final resolution at 120 days. [Ref. 13] When the DoD is taken to court and the claim is over \$1 million, it takes an average of five and a half years to resolve. [Ref. 37]

***b. Money***

Time is money. The more time spent on a case, the more it will cost in legal fees. Contractors pay significant legal fees in preparing and going to trial. The Government also stands to pay more to go to trial in the form of overtime, expert witnesses and other shifts in resources. Saving legal fees can be a great advantage in selecting arbitration over litigation. Since cases over \$1 million take an average of five and half years to resolve, the contractor and the Government stand to save substantial legal fees. Additionally, the Government stands to save money in potential interest if the claim is ultimately paid years down the road.

***c. Confidentiality***

In arbitration, all evidence that is presented to the judge or neutral is kept strictly confidential. The amount of the award shall remain private as well. This can be a great advantage to both sides because it encourages open communication. It benefits the contractor because it allows them to keep all proprietary and/or pricing data confidential.

***d. Preservation of Relationship***

Because arbitration uses more relaxed procedures and is seen as less adversarial than litigation, it is more likely to be resolved in a manner that preserves the relationship. Additionally, because the outcome is likely to be respected by both parties, the dispute is more likely to be resolved without ill will.

***e. Satisfaction with process and settlement***

In a Fortune 1000 survey [Ref. 29], over 60% of respondents selected satisfaction in the process as a reason they chose arbitration. While nearly 35% said satisfaction in the settlement was a reason they chose arbitration.

***f. Selection of Neutral***

Because both parties select the third-party neutral, it is more likely that the neutral will be an expert in the area of dispute. Typically, one arbitrator is selected. If the two sides cannot decide on one, they each select one and a third is appointed. This way they are both assured of having an expert in the field they are focusing on. Presenting evidence to an expert in the field is easier, saves both sides time and money and should result in a more informed decision

***g. Legal Precedence***

Any form of ADR does not establish legal precedence. By avoiding a legal precedence, both sides are protected from related claims. Additionally, an arbitrator is not required to use other cases or refer to them when making a decision. The arbitrator's decision is completely free from prior legal precedence and future precedence.

***h. Binding Decision***

Arbitration is binding and virtually non-appealable. [Ref. 24] Because the parties agreed to binding arbitration, a judge is not likely to reverse a decision made in arbitration. Once a decision is made, both sides can rest in the knowledge that it cannot and will not be appealed. Arbitrator's decisions are only set aside where fraud, partiality, misconduct or excess power was used. [Ref. 3] If the process was fair, it is rare that a court will overturn an arbitration award.

***i. Control of the Process***

Because both sides have control over the process, they can design it to suit the case. They have the ability to establish the rules and procedures to be followed when presenting the case. [Ref. 17] Both sides have the power to establish limits on the amount of evidence submitted and the amount of time allowed to present evidence. They also have the option of selecting the arbitrator and setting a limit on the award amount.

The main thing to consider when framing an arbitration process is that the outcome fulfills the “triune purpose of arbitration: speed, economy, and finality.” [Ref. 28]

### **3. Disadvantages**

Opposition to Arbitration can be traced back to the writing of the United States Constitution. [Ref. 36] Early Americans strongly favored the right to trial by jury and were outraged when it wasn’t included in the Constitution. The anti-federalists would not sign the Constitution until a right to trial by jury was included. This gave us the Seventh Amendment.

When compared to other forms of ADR, many of the disadvantages of arbitration are the same as its advantages.

#### ***a. Time***

Since arbitration is most like litigation of all the forms of ADR, it is the most time consuming. In addition, there is no clear evidence that arbitration saves time or money. [Ref. 36] Depending on the arbitrator and procedures selected, arbitration can actually take longer.

Time can also be used against one of the parties. If time is critical and one of the parties is seeking preliminary relief, the other party can delay selection of an arbitrator, making relief meaningless. [Ref. 11] The other party can also be using arbitration to thwart civil filing deadlines.

Some cases are appropriate for arbitration where the potential award is minimal. When the award is potentially significant, the race for a quick settlement may be achieved at the expense of quality.

#### ***b. Money***

Because arbitration is the ADR procedure that is closest to litigation, it is the most expensive. When one takes a case to court, the cost of the judge and services of the court are free. In arbitration, both parties bear the costs of the arbitration proceedings, including the arbitrator’s fee, travel, and living expenses.

In arbitration, just as in litigation, both sides are required to duplicate the normal process of getting to trial. [Ref. 11] Both sides pay an attorney to prepare all pre-

trial motions and hearings, establish discovery and attend to its related disputes. The lawyers must attend all pre-trial conferences, gather and prepare all exhibits and write all briefs. On top of all these normal costs, both sides are required to pay the arbitrator to review and administer all this information. In civil court, the clerk handles most of the administrative process. But in arbitration, the arbitrator charges for these procedures. The added expense of paying for the arbitrator vice using the civil system can negate any savings realized in the shortened discovery process.

***c. Confidentiality***

The desire for confidentiality can affect the quality of the decision. Because arbitration is not always well documented it is less subject to public scrutiny and therefore lacks the quality control of litigation. [Ref. 34]

***d. Preservation of Relationship***

Because arbitration is the most formal ADR it is the most adversarial. The process is more of a win/lose scenario that is more likely to harm the relationship.

***e. Satisfaction with Process & Settlement***

Some parties refuse to use arbitration as an ADR method for fear of being dissatisfied with the outcome. Possible dissatisfaction in the outcome is the second largest perceived barrier to using arbitration. [Ref. 29] There is also a perception that the neutral is likely to “split” the difference.

***f. Selection of Neutral***

Selecting a neutral is the most important aspect of arbitration. It is also the most difficult. [Ref. 28] Selection can be done with the assistance of an agency or without. The best neutral for a given case may be one that is unknown to either side. When selecting a neutral, it is important to do so based on their experience. Unfortunately, information on the neutral is not always independently verified. [Ref. 11] Although uniform biographical information is not yet available on all neutrals, it is important to select one that is truly neutral and experienced with the issue in dispute.

Another problem is that the neutral could be closely associated with one of the parties in the case. For example, a trial lawyer who specializes in suing the



Government might not be an appropriate neutral in Government cases. Another potential unknown is where one side routinely selects the same neutral. This may create an atmosphere where one side ostensibly employs the arbitrator. Consciously or unconsciously the arbitrator may make judgments that favor the side that routinely employs them because they provide them with repeat business. [Ref. 27]

A lack of confidence in arbitrators and a lack of qualified arbitrators were the third and fourth largest perceived barriers to using arbitration in the Fortune 1,000 survey. [Ref. 29]

***g. Legal Precedence***

The disadvantage that a lack of legal precedence has in arbitration is when one party is seeking a legal precedent. If this is the case, no form of ADR should be used.

A different aspect of legal precedence is that arbitrators are not required to make their decisions based on legal precedence. This can make it difficult to predict the outcome in arbitration cases.

***h. Binding Decision***

The largest perceived barrier to arbitration in the Fortune 1,000 survey [Ref. 29] was that arbitration is binding and quite difficult to appeal. Although the outcome is binding, enforcing it may be difficult. For example, if an arbitrator rules that a contractor shall continue performance in a contract, it can be difficult to enforce performance. This particular failure of arbitration may lead to litigation, which defeats the purpose of going to arbitration to begin with.

***i. Control of Process***

Some see the flexibility of arbitration as a lack of control in the process. When all rules of evidence and procedure are up in the air, it is difficult to predict how the proceeding will turn out. Procedural rules are not enforced or only enforced lightly. This also makes it difficult to predict the outcome of the case.

***j. Other Disadvantages***

Some see mandatory arbitration clauses as potentially dangerous for the employee or the consumer, particularly when used as a condition for employment or in consumer transactions such as credit card agreements or enrollment in health care plans. Mandatory arbitration clauses take away the right to a jury trial. Evidence shows [Ref. 36] that compared to jury verdicts, arbitration results in substantially lower awards.

#### **4. Case Suitability**

The best cases for arbitration are those that have one or two well-defined areas in dispute. Cases that involve a lower dollar value are good for arbitration since the attorney fees are lower. [Ref. 22] Other aspects of a suitable case include:

- Where the standard to be applied has already been established by statute, precedent or rule.
- When both sides do not need to set a precedent or establish policy.
- When the parties want the arbitrator to base the decision on some general standard without regard to the prevailing norm.
- When it would be valuable to have a decision-maker with technical and legal knowledge.
- When at least one side desires privacy.
- When the cost savings outweigh the potential for a technically accurate decision. [Ref. 34]
- When both sides desire to maintain a relationship.

Arbitration is also well suited if both parties wish to negotiate an agreement but are concerned about potential criticism of that decision either by superiors or personnel outside the organization.

### **C. SUMMARY TRIAL WITH BINDING DECISION**

#### **1. Background**

Both the Army and the Navy established Boards of Contract Appeals (BCAs) during World War I (WWI) and used them again in World War II (WWII). In 1949, the DoD merged the two boards to form the Armed Services Board of Contract Appeals

(ASBCA). The ASBCA's authority increased when the Supreme Court upheld the finality of the Board's decisions and ruled that cases could not be ruled *de novo* (anew) by the U.S. Court of Claims (now known as the Court of Federal Claims). [Ref. 5]

The ASBCA consists of 25-30 administrative judges with at least five years of experience in Government contract law. Their jurisdiction covers all contracts made by the DoD and agencies that designate ASBCA to hear their cases. They have the same authority to grant relief as the United States Court of Federal Claims but cannot grant injunctive relief or order performance of a contract. [Ref. 5]

The ASBCA began using ADR in 1987 but didn't use it regularly until the ADR Act of 1990. [Ref. 31] In the last five years, there has been a substantial increase in cases that have been settled using ADR techniques. A 1996 survey of ASBCA judges showed that the Summary Trial With Binding Decision accounts for approximately 40% of all ADR cases. [Ref. 18]

## **2. Advantages**

Compared to litigation, the advantages of the Summary Trial With Binding Decision are quite similar to the advantages of binding arbitration. Both sides can expect to save time because of the abbreviated discovery process. Saving time also leads to saving money since both sides can expect to pay fewer hours of attorney fees.

By agreeing to any ADR technique, both sides stand a better chance of preserving the relationship. Satisfaction in the process is probable due to the commitment of the ASBCA to working with both parties throughout the process. The parties can elect to have one judge hear the case or a panel of judges hear it. Since ASBCA judges come from both the private and the public sector, there is a variety of experience. [Ref. 5]

Just as in arbitration, the decision is binding and sets no precedence. Both sides exercise significant control of the process because the agreement to use the ASBCA is drafted by both sides with the assistance of the judge. [Ref. 22]

## **3. Disadvantages**

The disadvantages of utilizing the Summary Trial With Binding Decision are quite similar to arbitration as well. Compared to other forms of ADR, the Summary Trial

takes the most time to prepare for and as such costs the most in attorney fees. There are limits in confidentiality due to the Freedom of Information Act.

The Summary Trial is still typically an adversarial, win/lose process so preserving the relationship is not the number one priority. The win/lose situation implies that one party will be dissatisfied with the binding outcome. The limited selection of neutrals makes satisfaction with the process dependent on the assistance provided by the judge.

#### **4. Case Suitability**

In addition to the same suitability as commercial arbitration, the Summary Trial With Binding Decision is well suited for certain appeals already filed with the ASBCA:

- Cases in which the contractor is seeking to use the expedited small claims procedure for appeals less than \$50,000.
- When the contractor elects to use the accelerated procedure for claims less than \$100,000.
- Where litigation costs are a major concern. [Ref. 22]

#### **D. CONCLUSION**

The researcher has identified the advantages and disadvantages of commercial arbitration and the Summary Trial With Binding Decision when compared to litigation. As the second most popular form of ADR, [Ref. 35] arbitration and its cousin, the Summary Trial With Binding Decision, deserve consideration if the case is appropriate.

## **IV. ANALYSIS**

### **A. INTRODUCTION**

The researcher has provided a background of Alternative Dispute Resolution (ADR) and briefly described the different types of ADR. The researcher then described advantages, disadvantages and cases that are appropriate for both arbitration and the Summary Trial With Binding Decision. This chapter focuses on the differences between arbitration and the Summary Trial With Binding Decision, describes the potential benefits of allowing arbitration in the Department of Defense (DoD) and lists the barriers the DoD faces in using arbitration.

### **B. DIFFERENCES BETWEEN ARBITRATION AND SUMMARY TRIAL WITH BINDING DECISION**

Chapter III illustrated how commercial arbitration and the Summary Trial With Binding Decision are similar in nearly every aspect. There are, however, differences between the two that are worth noting.

#### **1. Time of Agreement**

##### ***a. Arbitration***

The two parties in a contract or agreement have three basic opportunities to agree to arbitration. The first is by requiring arbitration as part of the original agreement or contract. The second is by agreeing to use arbitration after the dispute arises. The third is by agreeing to arbitration after one side has filed a claim. Arbitration procedures allow for either party to request arbitration at any time.

##### ***b. Summary Trial With Binding Decision***

In order for the Armed Services Board of Contract Appeals (ASBCA) to use any ADR procedure, they must first determine if ADR is an appropriate use of the Board's resources. (Ref Park Conroy) In a 1996 Board of Contract Appeals survey, the

only requests for ADR that were denied were those that did not have the support of both parties. [Ref. 18]

Assuming that the ASBCA is willing to use ADR, there are two basic opportunities to request the Summary Trial With Binding Decision. The parties may request it after the dispute arises or after an appeal has already been submitted. The ASBCA's standard procedures include informing both sides of an appeal on the availability of ADR. The important point of using any request for ADR at the ASBCA is that both parties agree to it. Unfortunately, after an appeal has already been submitted, both parties are more likely to be entrenched in their positions and will be less likely to come to any agreements. [Ref. 4]

## **2. Time to Resolve Issue**

### ***a. Arbitration***

As discussed in Chapter III, there is no clear evidence that arbitration saves time. Due to the lack of information on available neutrals, the procedure of selecting a neutral could be a long process. The neutral selected could make arbitration take more time than needed. Some neutrals carry out their cases as if they were in a traditional court setting. [Ref. 11] The amount of time saved in arbitration is highly dependent on how quickly a neutral is selected and which neutral is selected. [Ref. 36]

### ***b. Summary Trial With Binding Decision***

The amount of time that it takes to resolve a dispute using the Summary Trial With Binding Decision is dependent on the agreement that the two parties make. This means that all time saving measures are dependent on the amount of discovery each side agrees to allow.

## **3. Cost**

### ***a. Arbitration***

Because arbitration is a commercial process, the two parties must pay all costs of the arbitrator. The costs of the arbitrator can be born by one side of the dispute, but this is not the norm. Usually, both sides agree to split the costs. [Ref. 1] Depending

on the arbitrator selected and the type of dispute, the arbitrator's fees can be quite extensive. The two parties must pay for the arbitrator's time just as they would for an attorney. This includes all travel and living expenses. It also includes the time the arbitrator spends reviewing and administering all material in the case.

***b. Summary Trial With Binding Decision***

The ASBCA and the Department of Justice do not charge DoD activities directly for their services. However, the cost to operate these activities is an overall cost of the Federal Government that is born by the U.S. taxpayers as an indirect cost of the DoD's operations.

**4. Privacy**

***a. Arbitration***

In arbitration, the entire proceeding can be kept confidential. If the two parties agree, both the material presented and the decision of the arbitrator remains private.

The ADR Act of 1996 has an entire section (section 574) dedicated to maintaining confidentiality in the ADR process. It includes limited Freedom of Information Act (FOIA) exemptions for communication with the neutral. This exemption is for communication only - since the ADR Act of 1996's definition of communication does not include the "final written agreement or arbitral award reached." [Ref. 33] Hence, if arbitration were allowed in the DoD, the decision might not be confidential. ASBCA Judges Carol Park Conroy and Martin J. Harty confirm this controversy by saying, "The scope of ADRA's confidentiality provisions remains untested." [Ref. 22] The researcher observes that the confidentiality of the final decision is not clearly addressed in the ADR Act of 1996 and as such could be open to interpretation.

***b. Summary Trial With Binding Decision***

Parties that wish to have confidentiality protection in the Summary Trial With Binding Decision process need to agree what aspects are to remain private and work closely with the presiding judge in order to develop an effective plan. All decisions made

by the ASBCA are subject to the Freedom of Information Act and as such are available to the public.

## **5. Selection of Neutral**

### ***a. Arbitration***

When selecting an arbitrator, the two parties can select any neutral they feel would be appropriate for the case. This is an excellent opportunity to select a neutral that is an expert in the matter under dispute. They can select the neutral on their own or use an agency such as the American Arbitration Association or the Center for Public Resources. If the two parties cannot agree on a neutral, each side can select one, then have the third be appointed (typically by the two).

### ***b. Summary Trial With Binding Decision***

The two parties can request a particular judge at the ASBCA. Their choice is limited to the 25-30 judges at the ASBCA and by the schedules of the preferred judges. In a sample agreement, [Ref. 9] the parties suggested one of three judges. Since the ASBCA has not denied any requests where both parties agreed to ADR, [Ref. 18] the researcher concludes that the availability of a qualified judge is certain.

## **C. POTENTIAL BENEFITS OF THE DOD USING BINDING ARBITRATION**

### **1. Consistent with Acquisition Reform Principles**

The Federal Acquisition Streamlining Act (FASA) and the Federal Acquisition Reform Act (FARA) were both written to encourage the DoD to utilize more commercial practices. This makes the jobs of procurement officials easier and makes it easier for firms to do business with the Government. Arbitration is a commercial practice that 78% of the Fortune 1000 corporations utilize. [Ref. 38] This fact alone should encourage the DoD to use arbitration more.

It is no a secret that conducting business with the DoD is a process that requires a great deal of effort. Complex contracts that require the quick resolution of claims are



particularly suited for arbitration. The construction industry is an example where claims are complex and arbitration is the norm. [Ref. 24] If arbitration were allowed, construction contracts would be the logical place to start.

## **2. Choice**

Choice applies not only to the DoD but also to the commercial parties' side in a dispute. Since arbitration is the second most popular form of ADR, both sides should have the choice to select arbitration as the ADR vehicle to resolve their dispute. Arbitration is one more tool that could be used to resolve disputes. Having more tools to resolve ADR gives everyone just one more opportunity to save time and money and preserve the relationship the DoD has with its contractors.

## **D. BARRIERS TO THE DOD USING BINDING ARBITRATION**

### **1. Lack of Guidelines**

The ADR Act of 1990 and 1996 specifically allowed the use of arbitration as a means of resolving disputes. However, it required the agencies to establish guidelines on the use of arbitration that would then need to be approved by the Attorney General. As of October 2001, only the Federal Deposit Insurance Corporation and the Federal Aviation Administration had prepared such guidance. [Ref. 23]

### **2. Cost**

There is no special funding pool to employ arbitration. This means that anyone who wishes to use arbitration will need to "find" the funds to pay for it. Usually this is done with funds from the program office or with funds from the activity that requested the material or service in dispute. [Ref. 2] Although this is true for any form of ADR, it is even more so for arbitration since arbitration is the most expensive form of ADR. Any settlement would be paid out of the funds that would be used if the two parties had negotiated the settlement without ADR.

If arbitration were allowed, there is a less expensive means of paying for a neutral. The Navy, Air Force and DLA have an informal agreement to exchange neutrals

for ADR cases. The user need only pay travel expenses. [Ref. 1] This option is only available if both parties agree to use a DoD arbitrator.

### **3. Staffing**

Commercial firms have the ability to quickly add lawyers to a particular dispute. But, DoD lawyers are not staffed in a manner that allows them to “ramp up” quickly for arbitration. This puts the Government side at a disadvantage in terms of case preparation and presentation. [Ref. 23]

### **4. Ability to Appeal**

The Court of Federal Appeals affirms about 85% of the lower court’s decisions. If the Federal Government prevailed in the lower court, the court of appeals affirms about 95% of the lower courts decisions. In cases where the Federal Government lost in the lower court, about two thirds are being reversed. This illustrates the attractiveness in the ability to appeal. [Ref. 23]

### **5. Uniqueness of DoD Contracts**

The Federal Government has a unique system of writing contracts. The rules and regulations the DoD is required to follow are innumerable and difficult for industry to follow. The DoD is comfortable with this bureaucracy and is not inclined to give up control of a litigation process that has so far been successful. [Ref. 23]

Another unique aspect of DoD contracts is the real or perceived imbalance of power. This imbalance of power could lead some arbitrators to “level the playing field” by ruling against the DoD.

Lastly, mandatory arbitration clauses in Government contracts are completely contrary to all Federal Acquisition Regulation principles of fairness and equity. The ADR Act of 1996 strictly prohibits the Government from requiring arbitration as part of the original business agreement: “An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.”

## **E. SUMMARY**

This chapter discussed the major differences between commercial arbitration and the Summary Trial With Binding Decision. It then listed the potential benefits of the DoD using binding arbitration and concluded by listing the barriers the DoD faces in developing an arbitration program.

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## **V. CONCLUSION**

### **A. INTRODUCTION**

This thesis introduced the reader to the legislative history of Alternative Dispute Resolution (ADR) and provided brief definitions of the various types of ADR. The advantages and disadvantages of ADR were listed and a summary of appropriate and inappropriate cases for ADR was then discussed.

A detailed description of arbitration and the Summary Trial With Binding Decision was presented. The advantages and disadvantages of the two were listed and a discussion of cases that are appropriate and inappropriate for arbitration and the Summary Trial With Binding Decision was then provided.

The researcher listed the differences between arbitration and the Summary Trial With Binding Decision. The benefits and barriers to allowing arbitration in the Department of Defense (DoD) were then discussed.

This chapter will draw conclusions about the implementation of arbitration in the DoD and make recommendations about potential arbitration guidelines. It will conclude with answers to the primary and secondary research questions and a list of areas for possible future research.

### **B. CONCLUSIONS**

The researcher has drawn the following conclusions:

1. Arbitration is an excellent vehicle for resolving disputes. The DoD would be well served to take advantage of this popular ADR technique.
2. The Summary Trial With Binding Decision is an excellent vehicle for resolving disputes. The DoD should continue to encourage contract personnel involved in disputes to consider this ADR technique available at the Armed Services Board of Contract Appeals (ASBCA).
3. Arbitration and The Summary Trial With Binding Decision are similar in nearly every respect. The most notable difference is the fact that as a commercial procedure, arbitration must be paid for while the services of the ASBCA are not charged

directly to the DoD. It is worth noting that although the services of the ASBCA are not billed directly to its users, any savings at the ASBCA are a savings to the taxpayer.

### **C. RECOMMENDATIONS**

The ADR Act of 1996 describes procedures necessary for agencies to utilize arbitration. It encourages ADR and includes an entire section (section 575) that specifically authorizes arbitration and provides detailed information on the requirements of arbitration agreements for the DoD.

By looking at the numbers of ADR cases resolved at the ASBCA, the current system that allows binding ADR only at the ASBCA appears to be an adequate means of conducting arbitration. The ASBCA received 68 requests for ADR in 1999 and 56 in 2000. Even if 45% of these requests were for arbitration, this does not appear to be a large demand for arbitration.

However, the DoD cannot ignore the popularity of arbitration in the private sector. With 78% of Fortune 1000 corporations using arbitration in the last three years and 71% expecting to expand their use of arbitration, [Ref. 38] the DoD could reasonably expect contractors to welcome arbitration as another means of resolving disputes.

Arbitration would be just one more tool for DoD personnel to resolve contract disputes. It is another opportunity to potentially save time and money, and preserve relations with the commercial sector.

The ADR Act of 1996 encourages Federal agencies to not only take advantage of the various forms of ADR but also to be a leader in the “development and refinement of such techniques” in order to “enhance the operation of the Government and better serve the public.” [Ref. 33]

With the above arguments in mind, the researcher provides the following recommendations:

1. Recommend the DoD explore the option of expanding ADR techniques to include binding arbitration.
2. Since arbitration is the norm in the construction industry, recommend establishing pilot arbitration guidelines that allow arbitration on construction contracts. If

arbitration is proven successful in construction contracts, then the DoD can expand the number of cases that are appropriate for arbitration

## **D. ANSWERS TO RESEARCH QUESTIONS**

### **1. Primary Research Question**

**What are binding arbitration and the Summary Trial With Binding Decision, their advantages and disadvantages and how are these forms of Alternative Dispute Resolution (ADR) beneficial to the DoD?**

Binding arbitration is an ADR technique where two parties in a dispute present their case to a third party neutral or panel. The neutral is a subject matter expert that is selected by the two sides. In arbitration, the rules of evidence are relaxed and the two parties agree on the amount of evidence and the amount of time that will be allowed for their presentations. The arbitrator makes a binding decision that has the full force and effect of law. The decision is private, does not set a precedent and cannot be appealed except where there is evidence of fraud, partiality, misconduct, or excess power. [Ref. 3]

The Summary Trial With Binding Decision is an ADR technique that is available at the Armed Services Board of Contract Appeals. As the name implies, board judges specialize in Government contract law and, as such, are considered experts in their field. Both sides draft an agreement before the proceedings that limits the number of witnesses, the amount of evidence and the amount of time for presentations. The two parties present their case to a board judge. After hearing both sides, the judge renders a decision that is binding and fully enforceable. The decision does not set a precedent and cannot be appealed.

When compared to litigation, the advantages of binding arbitration and the Summary Trial With Binding Decision are significant. They both potentially save time and money by shortening the dispute process. They both have the advantage of confidential communications with the neutral. The procedures are not as formal as litigation so the two parties are more likely to preserve their relationship. Both procedures allow greater control over the process to include discovery and selection of the neutral. Both procedures provide a binding decision that does not set a precedent.

Lastly, both procedures lead to potentially more satisfaction in the process and in the final settlement.

When compared to other forms of ADR, the disadvantages of binding arbitration and the Summary Trial With Binding Decision are much the same as the advantages. They both take the most time to prepare for so they cost more than other forms of ADR. Since they both involve a discovery process and presentations to a neutral the amount of control in the process is lowest. Both still typically are adversarial, win/lose procedures so preserving the relationship is not the number one priority. The win/lose situation and the binding aspect of the decision imply that one party may be dissatisfied with the outcome.

## **2. Secondary Research Questions**

### **What is the history and background of ADR?**

Forms of ADR have been in use for centuries, but ADR as a term or phrase got its start in the 1960s. [Ref. 8] The history of ADR in the DoD began with the Contract Disputes Act (CDA) of 1978. The CDA was written to eliminate unnecessary delay by contacting officers in rendering decisions and to prevent over inflation of claims by contractors. Although, the CDA didn't require ADR, it did allow both contracting officers and contractors to request ADR. It also required both the DoD and the contractor to state in writing their justification for refusing ADR.

The ADR Act of 1990 required agencies to establish ADR policies, appoint dispute resolution specialists, and develop ADR training programs. It required agencies to review all procedures and contracts for ADR possibilities. The Act amended the Federal Acquisition Regulations (FAR) to encourage ADR use and required a written explanation citing specific statutory reasons whenever a contractor or contracting officer declines a request for ADR. It encourages agencies and their contractors to adopt an ADR pledge. It created binding and non-binding arbitration procedures and created a framework of confidentiality for ADR proceedings.

The ADR Act of 1990 included a sunset provision that terminated its authority on October 1, 1995. The ADR Act of 1990 was extended by the Federal Acquisition



Streamlining Act of 1994 and became permanent with the passage of the ADR Act of 1996.

The Administrative Dispute Resolution Act of 1996 made only minor changes to the 1990 version. It eliminated the need to certify claims below \$100K, strengthened confidentiality measures and provided additional guidance on the use of binding arbitration

**How do commercial organizations use binding arbitration to resolve contract disputes?**

In the commercial sector, binding arbitration is the second most common form of ADR. [Ref. 21] A recent survey showed that 78% of the Fortune 1000 corporations used arbitration in the last three years while 71% expect to expand their use of arbitration. [Ref. 38] The leading reason cited for not using arbitration was the unwillingness of the opposing party to participate.

Commercial companies have three opportunities to use arbitration. The most common is where arbitration was part of the original business agreement. [Ref. 29] The second is when the two parties have a dispute and agree to resolve it through arbitration. The third opportunity is after one side has already filed a claim.

**What are the principal similarities between how commercial organizations and the DoD use binding arbitration?**

There is no similarity between how commercial organizations and the DoD use binding arbitration because binding arbitration is not allowed in the DoD. However, there are similarities between commercial arbitration and the Summary Trial With Binding Decision. The two techniques are similar in nearly every respect. They are both ADR procedures that use third party neutrals to adjudicate their dispute. Both procedures use an abbreviated process that potentially saves time and money and helps preserve the relationship. Both allow selection of the neutral and allow confidential discussions with the neutral. The decisions are binding and do not set a precedent.

**How might the DoD improve or enhance its use of the commercial application of binding arbitration?**

Since binding arbitration is not allowed in the DoD, the only way to improve or enhance its use would be to make it available. In order to make arbitration available, the

DoD would need to establish guidelines and have them reviewed by the U.S. Attorney General. The guidelines would need to include the appropriate circumstances for arbitration, who has the authority to commit the DoD to arbitration and the monetary limits needed for a given case. [Ref. 33]

## **E. AREAS FOR FURTHER RESEARCH**

The following areas warrant further research:

1. Analysis of satisfaction with the Summary Trial With Binding Decision.
2. Develop model arbitration guidelines necessary to implement arbitration in the DoD. The guidelines should include a detailed list of the appropriate circumstances where the DoD should agree to binding arbitration, a recommendation on who should have the authority to make arbitration agreements, and recommendations on the award limits that should be set.
3. Analysis of the advantages and disadvantages of Internet based arbitration. Include an analysis of what cases are appropriate for online arbitration.

## **F. SUMMARY**

The researcher closes this thesis with an observation from the past and a look at the future to illustrate the importance arbitration plays in resolving disputes.

Arbitration has played an important role in U.S. history. Even George Washington was an advocate of arbitration. In his will, he instructed that if the parties have a dispute that the matter should be resolved with a three-man panel. One man was to be appointed by each side while the third was to be chosen by the two. The decision was to be, “as binding on the parties as if it had been given in the Supreme Court of the United States.” [Ref. 25]

Although arbitration is currently the second most popular form of ADR, with the advent of the Internet, it stands to grow quickly. For instance, business-to-business (B2B) e-commerce was valued at over \$1.2 trillion in 2000 and is expected to grow six fold over the next five years. Likewise, online dispute resolution providers are claiming yearly caseloads in the tens of thousands. [Ref. 26] Therefore, arbitration could easily

grow and, numerically, become the most popular means of resolving disputes. In order to be the forerunner by resolving disputes in the most efficient and most effective manner, the DoD must take every opportunity to expand its use of ADR

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